Lost Insurance Policies Cover Old Pollution Claims

Because most liability insurance policies issued before the 1970's did not contain pollution exclusions, they may cover the cost of cleaning up hazardous substances that the insured discharged during the 1960's or earlier. When an insured needs coverage under an old insurance policy that it cannot locate, it must use secondary evidence to prove what the terms of the policy were. A recent decision by the United States District Court for the Western District of Michigan illustrates how this can be accomplished.

Aero-Motive Manufacturing Company (Aero I) manufactured hose reels from 1939 forward. In 1972, the owners (Beckers) sold the company to Kalaco, Inc., which later changed its name to Aero-Motive Manufacturing Company (Aero II).

In 1992, Aero II removed an underground storage tank that it had installed in 1974. In the process, Aero II discovered additional contamination under a warehouse that may have resulted from operations conducted by Aero I. In 1999 and 2001, respectively, Aero II sued the Beckers and Aero I to recover the cost of cleaning up contamination under the warehouse. The Beckers and Aero I notified Century, Continental and One Beacon, the insurance companies that had issued liability policies for 1964-1965, 1965-1968, and 1968-1972, respectively. Century agreed to pay a portion of the cost of defending the lawsuits. In 2002, Aero II, the Beckers, and Aero I signed a Consent Judgment for $5,000,000, under which the Beckers agreed to pay $100,000 and Aero II agreed to seek the balance of $4,900,000 from the insurers for the Beckers and Aero I.

Aero I's insurers then sued the Beckers and Aero I for a judgment declaring their policies did not cover the pollution claim by Aero II. The insurers asked the court to decide the case in their favor before trial on the ground that Aero I and the Beckers had failed to produce enough

evidence of the terms of their policies to show that the policies covered Aero II's claim. Aero I and the Beckers filed a motion of their own asking the court to rule that they did have enough evidence to prove what the terms of the policies were.

One of Aero I's key items of evidence was an affidavit by Douglas Talley, an expert witness on reconstruction of lost insurance polices. The insurers argued that Mr. Talley was not qualified to testify as an expert witness, and that his affidavit did not meet the minimum requirements for expert testimony. The court overruled the objections, finding that Mr. Talley had significant experience in commercial insurance underwriting, knew about forms used in the insurance industry, and had substantial practical experience in reconstructing lost insurance policies. The court held that Mr. Talley's methodology for reconstructing lost insurance policies was sufficiently reliable for the court to accept his testimony, and that the test for reliability should be applied flexibly to the subject of reconstructing missing insurance policies.

The court noted first that under Michigan insurance law, an insured may prove the terms of a missing insurance policy by presenting secondary evidence such as insurance binders, declarations pages, testimony from insurance agents or brokers, testimony from insurance policy reconstruction experts, and standard policy forms used by the insurer during the relevant period. The court then considered the motions filed by each of the insurers.

To prove that Century had issued policies, and to prove the terms of those policies, Aero I presented evidence including: (1) the schedule of underlying primary policies in an excess policy; (2) correspondence from Century's attorney stating that Century did not dispute that it had issued a certain policy to Aero I; (3) deposition testimony from a Century employee; and (4) an affidavit from Mr. Talley stating his opinion that liability insurance policies from 1964 to 1972 did not include pollution exclusions. Century argued, among other things, that Aero I

could not prove the terms of one of its policies because it was a "manuscript" policy rather than a "standard form" policy. Mr. Talley testified on behalf of Aero I that the material terms of manuscript policies were based on language contained in standard forms, and that he could, therefore, reconstruct the terms of Century's manuscript policy with reasonable certainty. The court concluded that this evidence met Aero I's burden of proving the material terms of the policy. Century also argued that Aero I had failed to show that its policy did not contain a pollution exclusion. Mr. Talley testified that pollution exclusions were not generally used by the insurance industry until the 1970's. That conclusion was supported by the fact that Century had issued a policy to Aero I in a later year which did not include a pollution exclusion.

To prove the existence and terms of the One Beacon insurance policies, Aero I relied on: (1) the declarations page of a policy stating that it was a renewal of an earlier policy; (2) deposition testimony of the insurer's employee confirming that the policy was a Special Multi-Peril policy; (3) Aero I's ledger of prepaid insurance showing that Aero I had paid insurance premiums for the One Beacon policy; (4) Mr. Talley's affidavit concluding that the One Beacon policy did not include a pollution exclusion. The court held that because the policy was a renewal of an earlier policy, Aero I was entitled to rely on the rule that a renewal policy is presumed to be issued on the same terms, conditions and amounts as in the original policy. One Beacon also argued that it began to issue policies with pollution exclusions in 1970, and that Aero I had failed to prove that its policies for 1970 through 1972 did not include pollution exclusions. The court rejected this argument because the declarations pages for the policies that One Beacon had issued to Aero I in the earlier years did not list the code for the pollution exclusion, whereas the declarations page for the final policy did list that code.

The court held that Aero I had presented sufficient evidence to allow its case to proceed to trial, and dismissed the motions by Century and One Beacon.

To prove the existence and terms of the Continental policies, Aero I relied on: (1) the schedule of underlying policies in the excess policy issued for the same time period; (2) a property insurance binder for that period stating that the risk was covered by a Continental policy; (3) Aero I corporate ledger sheets showing prepaid insurance premiums; (4) deposition testimony from a Continental employee explaining that the CBP prefix indicated that the policy was a Continental policy, and that such policies always used standard form number 600; (5) an affidavit from Mr. Talley concluding that the Continental policy did not include a pollution exclusion. Nonetheless, the court held that Aero I had not proved coverage under the Continental policy because Aero I could not offer any evidence showing when the Continental policy changed from an occurrence-based policy to an accident-based policy, or when the limit of liability was reduced from $100,000 to $25,000.

The court concluded that Aero I had sufficiently proved the existence and material terms of the policies issued by Century and One Beacon, but not the policies issued by Continental.

Century Indemnity Company v. Aero-Motive Company, Case No. 1:02-CV-108 (United States District Court for the Western District of Michigan, Opinion dated February 18, 2003).

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